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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 126.

THE ORDER OF RAILROAD TELEGRAPHERS,
Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY
(Buffalo and East),
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI.

FREDERICK L. WHEELER,
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The New York Central
Railroad Company
(Buffalo and East).

GERALD E. DWYER,
JAMES L. MORE,
Of Counsel.

THE COURT PRESS, N. Y. C.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI.

Statement.

Petitioner, The Order of Railroad Telegraphers, seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Southern District of New York granting respondent's motion for summary judgment, dismissing the petitioner's alleged cause of action and denying petitioner's cross-motion for summary judgment.

The judgment sought to be reviewed was entered upon the unanimous decision of the Court of Appeals,

consisting of Chief Circuit Judge Learned Hand and Circuit Judges Swan and Chase, which is reported at 181 F. 2d 113. The opinion of Judge Ryan of the District Court is not officially reported.

The proceeding in the District Court was commenced by the filing of a petition to impeach a formal interpretation by a statutory Board of Arbitration of an arbitration award rendered by that Board in a railway labor dispute between the parties. The proceeding to impeach the interpretation, as well as all administrative proceedings prior thereto, are governed by the provisions of the Railway Labor Act of 1926, as amended (44 Stat. 577, 48 Stat. 1185; 45 U. S. C. § 151 *et seq.*).[1]

The administrative proceedings leading up to the rendition of the award and interpretation of the Board of Arbitration sought to be impeached were set in motion on April 30, 1945 by service by petitioner, The Order of Railroad Telegraphers (hereinafter referred to as the "Organization"), upon respondent, The New York Central Railroad Company (Buffalo and East) (hereinafter referred to as the "Railroad"), of written notice under the provisions of the Railway Labor Act demanding wholesale rules changes in the then existing collective bargaining agreement between the parties.

Following extended negotiations between the Railroad and the Organization, resulting in agreement by the parties on the majority of some 38-odd proposed rules, the services of the National Mediation Board were invoked by the Organization, under the provisions of Section 5, First (a) of the Railway Labor Act, to adjust and compose differences as to the bal-

[1] Pertinent provisions of the Railway Labor Act are set forth in Appendix hereto, *infra*, pp. 15-20.

ance of the rules. The National Mediation Board assumed jurisdiction of the dispute and by the process of mediation resolved all differences except as to seven proposed rules.

The National Mediation Board then induced the parties, pursuant to the provisions of Section 5, First of the Act, to submit their controversy as to these seven rules to voluntary arbitration under the procedure provided for by Sections 7-9, inclusive, of the Act. On March 19, 1948 the parties entered into an arbitration agreement (R. 23) submitting their differences to a final and conclusive determination by a Board of Arbitration of three members, and providing in Article Fifteenth thereof that any differences arising as to the meaning or application of the forthcoming arbitration award would be referred back for a ruling to that Board (R. 25).

Thereafter, each party nominated an arbitrator intimately familiar with railway labor matters and these chose Dr. William M. Leiserson as the third arbitrator and chairman of the Board. Dr. Leiserson had been chairman of the National Mediation Board when that board had first been created in 1934, serving in that capacity from 1934-1937 and from 1943-1944;[2] in addition, he had served as first chairman of the National Railway Labor Panel created by President Roosevelt in 1942.[3]

The Board of Arbitration held hearings lasting almost one month at which the parties produced oral and documentary evidence amounting to almost 3500 pages of stenographic minutes and 253 exhibits the bulk of which related to the two rules on which inter-

[2] 1st Ann. Rept. Nat. Med. Bd. II (1935); 9th Ann. Rept. Nat. Med. Bd. II (1943).

[3] 8th Ann. Rept. Nat. Med. Bd. 3 (1942).

pretation was later sought. The Board rendered its award with respect to all the rules in dispute on June 24, 1948 (R. 109) and on the following day the Board filed its award, together with all papers and documents upon which it was based, in the office of the Clerk of the United States District Court for the Southern District of New York as required by the arbitration agreement and the Railway Labor Act.

In accordance with Article Eleventh of the arbitration agreement (R. 24), the award automatically became effective on July 1, 1948 although the award by its terms contemplated a complete formal contract between the parties at some later date in conformity therewith (R. 109-113). Before such a contract could be consummated, differences arose between the parties concerning the meaning and application of two of the rules contained in the award, namely, Rule 1 (Scope Rule) and Rule 22 (Train Order Rule) (R. 43-48). Briefly, the dispute was whether these rules as awarded contemplated placing certain work within the exclusive jurisdiction of the Organization although such work had theretofore been performed by railway employees belonging to other crafts and classes represented by different unions.

On August 3, 1948 the rules awarded by the Board of Arbitration, together with the rules previously agreed upon after negotiation and mediation had been completed, were reduced to writing in the form of a single instrument (R. 146) which purported to supersede only the then existing collective bargaining agreement between the parties (R. 148) but left unaffected the arbitration agreement and award and the commitments undertaken by the parties thereunder.

On the same date, and subsequently, the parties discussed their differences as to the meaning and appli-

cation of the two rules in the award, both orally and by correspondence, and also considered a joint application to the Board of Arbitration for clarification of the award in that respect (R. 44-45). Settlement of these differences not being attained, the Railroad applied to the National Mediation Board to reconvene the Board of Arbitration for interpretation and clarification of its award in accordance with Article Fifteenth of the arbitration agreement (R. 25) and Section 5, Third (d) of the Railway Labor Act.

Thereafter, extensive correspondence was exchanged between the parties and the National Mediation Board (R. 50-107) in which the Railroad set forth fully and completely the precise nature of the controversy over the award and the questions upon which interpretation was necessary and desired, and in the course of which the Organization aired at great length various objections to the jurisdiction of the National Mediation Board to reconvene the Arbitration Board and of the Board of Arbitration to rule on its award.

On October 21, 1948 the National Mediation Board advised the parties that the Board in executive session had considered the question raised by the Railroad's request and decided that the Arbitration Board should be reconvened under the provisions of the arbitration agreement and the Railway Labor Act (R. 108).

The Board of Arbitration subsequently reconvened in accordance with Section 7, Third (c) of the Act and conducted further hearings upon the matters in controversy. The Organization appeared at these hearings, reasserted its contentions with respect to lack of jurisdiction and argued the merits of the questions submitted for interpretation and clarification. On January 15, 1949 the Board of Arbitration issued its rulings with respect to the meaning and

application of the two rules in dispute (R. 125) which interpretation was filed on January 17, 1949 in the office of the Clerk of the United States District Court for the Southern District of New York.

The Organization then commenced the present proceedings by filing a petition (R. 2) seeking to impeach the interpretation of the Board of Arbitration under the procedure provided by Section 9 of the Act. After filing its answer to the petition (R. 4), the Railroad moved for summary judgment (R. 7) and the Organization made a cross-motion for summary judgment (R. 12). District Judge Ryan in his opinion and order (R. 16) granted the Railroad's motion for summary judgment dismissing the Organization's impeachment petition, and denied the cross-motion. This order was affirmed by judgment of the Court of Appeals for the Second Circuit filed March 30, 1950 (R. 154).

Issues Before This Court.

The only real issue presented on this application is the question best described by the Court of Appeals in the following language: "Whether a Board of Arbitration which has made an award pursuant to the Railway Labor Act, 45 U. S. C. A. § 151 *et seq.*, loses jurisdiction to interpret the award once its terms have been incorporated into a collective bargaining agreement." (R. 154).

The Organization has also raised the wholly subsidiary issue, admitted by it to be "of limited significance" (Petition 13), of whether the Board of Arbitration exceeded its authority by allegedly deciding questions not referred to it and by amending, rather than interpreting, its original award.

POINT I.

The petition raises no question sufficiently substantial to warrant review by this Court.

Essentially, the only material ground urged by the Organization for entertaining its petition for review is the novelty of the primary issue. The novelty of the question is to be conceded but, once admitted, it is the alpha and omega of the matter. The novelty originates in the Organization's insistence on attributing to the unambiguous provisions of the Railway Labor Act and the arbitration agreement a lack of meaning which is at once dispelled by simple recourse to the relevant provisions of each.

Both the Railway Labor Act and the arbitration agreement between the parties clearly give the Board of Arbitration jurisdiction, as asserted in the administrative proceedings below, to interpret the meaning and application of the language used by it in making the award.

Section 8(m) of the Act provides that:

> "The agreement to arbitrate—
>
> * * * *
>
> (m) shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board * * * and that such ruling, when acknowledged in the same manner and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award;"

Article Fifteenth of the arbitration agreement between the parties so provided without any material change in language (R. 25). In addition, Section 5, Third (d) of the Act provides:

> "Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration * * *, and arrange for the reconvening of said Board of Arbitration * * *, and shall notify the respective parties to the controversy of the time and place at which the Board * * * will meet for hearings upon the matters in controversy to be submitted to it."

These provisions of the Act and agreement obviously are completely determinative of the rights of the parties here. In an attempt to overcome their effect, the Organization seeks to stress the subsequent action of the parties, in executing a collective agreement including provisions of the award, as apparently foreclosing the Railroad from the assertion of the remedy so clearly provided by statute and contract. In practical effect, it is the burden of the Organization's contention that the award is thereby expunged and the parties are relegated to administrative proceedings before the National Railroad Adjustment Board.

This contention, for one thing, ignores the plain fact that the collective agreement between the parties

did not purport to abrogate the award or arbitration agreement (R. 148-149) nor did it include all matters awarded by the Board of Arbitration (R. 110-117, 121-123, 146, 148).

In interjecting the matter of an alternate remedy under the Act, the Organization has discoursed at length on the subject of the "exclusive" jurisdiction of the National Railroad Adjustment Board under Section 3, First (i) of the Act over questions of interpretation or application of negotiated agreements. That subject has recently received the considered attention of this Court in *Slocum* v. *The Delaware, Lackawanna & Western Railroad Company,* 339 U. S. 239 and *Order of Railway Conductors* v. *Southern Railway Company,* 339 U. S. 255, so that it may be regarded as settled that, at least in the circumstances there presented, questions involving the interpretation or application of *negotiated agreements* cannot be litigated in the courts but must be determined in the first instance by the Adjustment Board.

As topical as that proposition may be, it hardly is responsive to the issue at hand nor does the Organization actually contend that it is. It is pertinent to observe that while the Organization has vaguely and obliquely given the impression that those two decisions are determinative of the issue here, it has nowhere stated that the judgment below is in conflict with the holdings of this Court. On the contrary, it is forced to admit that there are no prior court decisions on the primary issue (Petition 11).

The power vested in a Board of Arbitration to interpret and apply its own award is conceded. This power was given to such Boards by Congress in 1926 in the original enactment of the Railway Labor Act since which date the arbitration provisions of the Act

have remained unchanged. In its original form, the Act contained no provision for a National Railroad Adjustment Board to interpret and apply negotiated agreements. Such a board was created for the first time in the 1934 amendments to the Act (48 Stat. 1191). The legislative history of those amendments is completely devoid of any evidence of intent by Congress to infringe upon the arbitration procedure theretofore established and then available to disputants. As the Court of Appeals below correctly noted, there is no provision in the Act which causes the award to expire simply because its terms have been incorporated into a contract (R. 158).

The power given to the Board of Arbitration to interpret and apply its award is not an unlimited one. It is circumscribed in point of time by the life or duration of the award as given to it by the parties. Section 8(j) of the Act provides:

> "The agreement to arbitrate—
>
> * * * *
>
> (j) shall provide for the date from which the award shall become effective *and shall fix the period during which the award shall continue in force;*" (Italics ours.)

The parties here could have fixed a cut-off date on the Board's power to rule on its award by a specific time limitation[4] or by providing for termination of

[4] The eight Annual Reports of the United States Board of Mediation (predecessor of the National Mediation Board), covering the administration of the Railway Labor Act from 1926 to 1934, inclusive, disclose that of the 56 arbitration awards reported, in all but six instances the parties fixed an absolute period of one year with right to terminate thereafter; in two

the award upon inclusion of its provisions in a formal contract. Instead of doing so, by provision of Article Eleventh of the arbitration agreement between the parties (R. 24) that the award "shall continue in effect in accordance with the provisions of the Railway Labor Act, as amended", they agreed that the award should continue in effect until such time as either or both of the parties took some formal action in accordance with the processes prescribed by the Railway Labor Act to change, modify or rescind it. No contention is made by the Organization that any such action has been taken by either of the parties. The Court of Appeals appreciated that where the parties have not chosen an earlier date, such a choice cannot be made for them (R. 159).

The simple answer to the jurisdictional issue created by the Organization lies in the plain import of the arbitration provisions of the Act and of the arbitration agreement between the parties. No novel and strained interpretation of their unambiguous terms can overcome their clear effect. The power of the Board of Arbitration to interpret and apply its award can only be foreshortened by the contract to arbitrate entered into by the parties before the event.

The Organization has recognized that the situation can be so protected with respect to future arbitrations

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instances a period of precisely one year was fixed and in two other cases a fixed period of greater or less than one year terminable thereafter was agreed upon in the arbitration agreement. 1st Ann. Rept. U. S. Bd. of Med. 36-46 (1927); 2d Ann. Rept. 37-53 (1928); 3rd Ann. Rept. 19-28 (1929); 4th Ann. Rept. 16-18 (1930); 5th Ann. Rept. 18-19 (1931); 6th Ann. Rept. 27-28 (1932); 7th Ann. Rept. 27-28 (1933); 8th Ann. Rept. 27 (1934).

The National Mediation Board has discontinued the practice of reporting such information in its annual reports.

but suggests the possibility that arbitration agreements in the past may not have limited the duration of awards and the time within which Boards of Arbitration retained jurisdiction to interpret and apply their awards (Petition 11).[5] Aside from the fact that it has offered nothing but conjecture in this respect, available information, derived from the one governmental agency charged with the duty of supervising the arbitration procedure established under the Act, indicates that there is a substantially uniform practice in the industry for parties submitting to arbitration to fix the duration of the award and the power of the Arbitration Board to a limited period of time.[6]

As far as anything in the record or in the Organization's petition discloses, the instant case is *sui generis* and of moment only to the parties concerned.

The matter of *Brotherhood of Railway and Steamship Clerks* v. *The C. & O. Railway Company et ano.*, N. M. B. Interpretation No. 12, Case No. A-255, cited by the Organization (Petition 11), arose under an

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[5] The Organization has stated that 211 arbitrations have been conducted since 1934 (Petition 7). 15th Ann. Rept. Nat. Med. Bd. 20 (1949) fixes the total of arbitration agreements consummated since 1934 at 115 which, of course, would include instances where the parties settled their differences without any award being rendered. See, for example, 9th Ann. Rept. Nat. Med. Bd. 32 (1943).

[6] Note 4 *supra*. During the period 1926-1934 there were three instances of interpretation by a Board of Arbitration of its award. In each such instance the arbitration agreement provided for a one-year duration for the award terminable at any time thereafter and on each occasion interpretation was sought and rendered within the one-year period. See 2d Ann. Rept. U. S. Bd. of Med. 43-44, 52 (1928); 3rd Ann. Rept. U. S. Bd. of Med. 26-27 (1929).

entirely dissimilar set of circumstances, in no way involving mediation or arbitration as a step in arriving at a collective agreement, and, needless to say, did not concern any of the arbitration provisions of the Railway Labor Act. To the extent that the Mediation Board there refused to render an interpretation while in the instant case it ordered the Arbitration Board to reconvene for that purpose, that proceeding, of course, would tend to support the Railroad's position, assuming it were in point.

The Organization has professed its concern that the judgment below might result in "frustrating one of the devices utilized by Congress to achieve peace in the railway labor field" (Petition 13). In the Fifteenth Annual Report of the National Mediation Board (1949), at p. 1, it is stated to be "the duty of the National Mediation Board to aid in maintaining industrial peace in the railroad and air-line industries and thereby preventing interruptions to the free flow of commerce between the States." It is significant that that Board charged with a duty of such serious consequence has not shared the Organization's concern to the extent of intervening in these proceedings in support of the petition.

The subsidiary issue as to whether the Board of Arbitration exceeded its authority by going beyond the scope of the submission and by amending its award is disposed of by the Organization's frank concession that these questions are "of limited significance because their answer depends upon the particular facts of this specific case" (Petition 13). As this Court has stated: "We do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U. S. 220, 227. Certiorari is

not granted "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163.

CONCLUSION.

No important or substantial questions having been shown which would warrant review by this Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Railway Labor Act (45 U. S. C. §§ 155, 157, 158, 159).

Section 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory ef-

forts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

Section 5. Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

* * * *

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on

such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

* * * *

Section 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

* * * *

Section 7. Third. (c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed

in the same district court clerk's office, as the original award and become a part thereof.

* * * *

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

* * * *

Section 8. The agreement to arbitrate—

* * * *

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

* * * *

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by

agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award;

* * * *

Section 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration

rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

* * * *